IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
May 4, 2004 Session

TAMMY LYNN HUNTER v. TIMOTHY EDWIN HUNTER

Appeal from the Chancery Court for Maury County
No. 01-627 Robert L. Holloway, Judge

No. M2002-02560-COA-R3-CV - Filed June 21, 2005

The trial court granted a divorce to Wife on the ground of Husband's inappropriate marital conduct, divided the marital property, made Wife primary residential parent for the parties' two children, and ordered Husband to pay child support, alimony, and attorney fees. Husband argues on appeal that alimony was inappropriate, that the property division was based on incorrect determinations, and that the parenting plan adopted by the court gave him less residential time with the children than he was entitled to. We affirm the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed

PATRICIA J. COTTRELL, J., delivered the opinion of the court, in which WILLIAM C. KOCH, JR., P.J., joined. WILLIAM B. CAIN, J., not participating.

Delilah Speed; Matt Q. Bastian, Columbia, Tennessee, for the appellant, Timothy Edwin Hunter.

J. Russell Parkes, Wesley Mack Bryant, Columbia, Tennessee, for the appellee, Tammy Lynn Hunter.

OPINION

Wife filed a complaint for divorce on October 11, 2001. Husband answered and counter-claimed for divorce. After a two day bench trial, the trial court set forth its rulings in a letter to counsel. Wife's counsel prepared an order that was signed by the trial court and entered September 9, 2002. The order was inconsistent with the ruling in some respects. On October 9, 2002, Husband filed a notice of appeal. On January 8, 2003, Wife filed a Tenn. R. Civ. P. 60 motion in the trial court to clarify or correct the final order. In his appeal, Husband raises issues directly related to two of the matters that were dealt with inconsistently in the order and the ruling.

Immediately after oral argument, this court remanded the case for consideration of the pending Rule 60 motion and the preparation of an acceptable statement of the evidence. After giving the parties more than ample time to resolve these matters and file a supplemental record reflecting

their resolution, this court ordered the parties to show cause why this appeal should not be dismissed. The eventual result was the filing in this court on April 8, 2005, of a supplemental record that includes a March 10, 2005, order from the trial court, entered by agreement of the parties, amending and replacing the original final order. It also includes a statement of the evidence approved by the trial court.[1] We will address the issues based on the supplemental record.

I. ALIMONY

On the issue of alimony, much of Husband's brief is devoted to the argument that the trial court erred in awarding Wife alimony *in futuro*.[2] The revised final order makes it clear that the trial court did not award alimony *in futuro*. In pertinent part, it states:

> The Court finds that the Defendant has the ability to pay alimony and the Plaintiff/Wife has a need for same. Defendant should pay to Plaintiff One Thousand Eight Hundred Dollars ($1,800.00) per month for two (2) months beginning August and September of the year 2002. Husband is then Ordered to pay the sum of One Thousand Dollars per month for twenty-four (24) months beginning October of the year 2002. Husband is then ordered to pay Five Hundred Dollars ($500.00) per month for twenty-four (24) months commencing the month immediately following the two (2) year payment of One Thousand Dollars ($1,000.00).

Thus, the award by the trial court was to terminate at the end of fifty (50) months and was to decrease by the specified amounts over that time. Although the final order does not specifically state that the alimony is rehabilitative, we construe it as such, as does Wife. Accordingly, Husband's initial objection to an award of alimony *in futuro* is no longer relevant.

However, Husband's brief can also be fairly construed as arguing that Wife was not entitled to alimony of any kind. Tennessee Code Annotated § 36-5-101(a)(1) gives the courts discretion to order "suitable support and maintenance of either spouse by the other spouse . . . according to the nature of the case and the circumstances of the parties." In determining whether to award support, and the nature, amount and duration of such support, courts are to consider a number of factors:

> (i) The relative earning capacity, obligations, needs, and financial resources of each party including income from pension, profit sharing or retirement plans and all other sources;

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[1] After receiving our show cause order, Husband obtained new counsel who, with counsel for Wife, took the steps necessary to allow this appeal to proceed.

[2] Although the final decree as originally entered did not place a termination date on the $500 per month payment of alimony, the trial court's opinion letter set out an award of $1800 per month for two months, then $1000 per month for 24 months, and then $500 per month for another 24 months. The revised final order coincides with the trial court's original intent. In her brief and at oral argument, Wife did not assert that the alimony award was open-ended and on remand did not oppose any modification of the final decree to conform to the original decision.

(ii) The relative education and training of each party, the ability and opportunity of each party to secure such education and training, and the necessity of a party to secure further education and training to improve such party's earning capacity to a reasonable level;

(iii) The duration of the marriage;

(iv) The age and mental condition of each party;

(v) The physical condition of each party, including, but not limited to, physical disability or incapacity due to a chronic debilitating disease;

(vi) The extent to which it would be undesirable for a party to seek employment outside the home because such party will be custodian of a minor child of the marriage;

(vii) The separate assets of each party, both real and personal, tangible and intangible;

(viii) The provisions made with regard to the marital property as defined in § 36-4-121;

(ix) The standard of living of the parties established during the marriage;

(xi) The relative fault of the parties in cases where the court, in its discretion, deems it appropriate to do so; and

(xii) Such other factors, including the tax consequences to each party, as are necessary to consider the equities between the parties.

Tenn. Code Ann. § 36-5-101(d)(1)(E).

As can be readily seen, many if not most of the enumerated factors are directly related to the economic needs of the parties and their ability to meet those needs with the economic resources and earning potential available to them after divorce. Our courts have acknowledged this connection many times by stating that the most important factors to consider when deciding upon alimony are the need of the disadvantaged spouse and the ability of the other spouse to provide support. *Robertson v. Robertson*, 76 S.W.3d 337, 338 (Tenn. 2002); *Bogan v. Bogan,* 60 S.W.3d 721, 730 (Tenn. 2001); *Aaron v. Aaron*, 909 S.W.2d 408, 410 (Tenn. 1995).

An award of alimony presumes that the recipient is economically disadvantaged in relation to the other spouse. Where such disadvantage exists, the legislature has expressed a preference that

the disadvantaged spouse be rehabilitated by an award of rehabilitative support of limited duration. Tenn. Code Ann. § 36-5-101(d)(1)(C).

As the language of the statute indicates, the trial court has broad discretion in determining the type, amount, and duration of alimony to award, based upon the particular facts of each case. *Burlew v. Burlew,* 40 S.W.3d 465, 470 (Tenn. 2001); *Crabtree v. Crabtree,* 16 S.W.3d 356, 360 (Tenn. 2000); *Sullivan v. Sullivan*, 107 S.W.3d 507, 511 (Tenn. Ct. App. 2002); *Kinard v. Kinard,* 986 S.W.2d 220 (Tenn. Ct. App. 1998). Since alimony is largely a matter in the discretion of the trial court, appellate courts are not inclined to alter a trial court's award of alimony, unless the trial court applied an incorrect legal standard or reached a decision not supported by the facts that causes an injustice to the party complaining. *Eldridge v. Eldridge,* 42 S.W.3d 82, 85 (Tenn. 2001). Findings of fact by the trial court are presumed to be correct unless the evidence preponderates otherwise. Tenn. R. Civ. P. 13(d).

The Statement of the Evidence in this case indicates that the parties were married in January of 1988. Both had college degrees, and Wife had a teaching certificate from the State of Tennessee. When the couple married, they lived in Huntsville, Alabama, where Husband was employed. In November of 1989, they moved to Maury County, Tennessee, when Husband obtained a higher paying job there. Both parties testified that the decision to move was also based, in part, on the fact that Wife would be closer to her family. They remained in Maury County throughout the marriage. The parties had two children: Courtney, born July 7, 1991, and Timothy, born April 29, 1996.

Wife was unable to use her Tennessee teaching certificate while the couple lived in Alabama. After returning to Tennessee, she let the certificate expire. Husband testified he told Wife at that time it did not matter whether she worked or not. Wife testified that the decision to allow her certificate to expire was a joint decision. She also testified that at the time of the expiration the couple had begun having children and they both believed it was in the family's best interest that Wife not work full time.

For eleven years prior to the hearing, Wife had worked as the preschool education director at her church in Columbia. She was able to work part-time, approximately six hours a day, two days a week, and still care for the children.

At the time of the hearing, Wife was making $695 per month, working two and a half days per week. However, her hours were soon to be doubled due to expansion of the preschool program, and her salary was to increase to $1200 per month. Wife had explored the requirements for and possibility of recertification for teaching. She concluded her best option was to take the required courses at Middle Tennessee State University, but she could not enroll for the courses she needed until the next school year. She expected it would take two to four years for her to become recertified as a teacher because of her other responsibilities and limitations on her time and monetary resources.

At the time of the hearing, Husband's gross monthly income from his job was more than $5200. Wife was clearly economically disadvantaged compared to Husband in terms of income and

immediate earning potential. The parties had agreed that Wife would concentrate her time and efforts on raising the children and work outside the home only part time. Considering all the relevant factors and the facts of the case, the trial court's award of rehabilitative alimony for fifty months is appropriate. It was tailored to provide Wife with the short-term support that will allow her to obtain the credentials to become financially self-sufficient as a teacher. Husband has the ability to pay. We affirm the trial court's award of alimony.

II. PROPERTY DISTRIBUTION

The trial court is charged with equitably dividing, distributing, or assigning the marital property in "proportions as the court deems just." Tenn. Code Ann. § 36-4-121(a)(1); *Jolly v. Jolly*, 130 S.W.3d 783, 785 (Tenn. 2004). The court is to consider all relevant factors in its distribution. Tenn. Code Ann. § 36-4-121(c).[3] The court may consider any other factors necessary in determining the equities between the parties, Tenn. Code Ann. § 36-4-121(c)(11), except that division of marital property is to be made without regard to marital fault. Tenn. Code Ann. § 36-4-121(a)(1).

An equitable division does not necessarily have to be an equal division. *Robertson*, 76 S.W.3d at 341; *Cohen v. Cohen*, 937 S.W.2d 823, 832 (Tenn. 1996). Rather, it is achieved by considering and weighing the most relevant factors in light of the unique facts of the case. *Tate v. Tate*, 138 S.W.3d 872, 875 (Tenn. Ct. App. 2003); *Batson v. Batson*, 769 S.W.2d 849, 859 (Tenn. Ct. App.1988).

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[3] Tenn. Code Ann. § 36-4-121(c) reads as follows:

In making equitable division of marital property, the court shall consider all relevant factors including:

(1) The duration of the marriage;
(2) The age, physical and mental health, vocational skills, employability, earning capacity, estate, financial liabilities and financial needs of each of the parties;
(3) The tangible or intangible contribution by one (1) party to the education, training or increased earning power of the other party;
(4) The relative ability of each party for future acquisitions of capital assets and income;
(5) The contribution of each party to the acquisition, preservation, appreciation, depreciation or dissipation of the marital or separate property, including the contribution of a party to the marriage as homemaker, wage earner or parent, with the contribution of a party as homemaker or wage earner to be given the same weight if each party has fulfilled its role;
(6) The value of the separate property of each party;
(7) The estate of each party at the time of the marriage;
(8) The economic circumstances of each party at the time the division of property is to become effective;
(9) The tax consequences to each party, costs associated with the reasonably foreseeable sale of the asset, and other reasonably foreseeable expenses associated with the asset;
(10) The amount of social security benefits available to each spouse; and
(11) Such other factors as are necessary to consider the equities between the parties.

Because dividing a marital estate is a process guided by considering all relevant factors, in light of the facts of a particular case, a trial court has a great deal of discretion concerning the manner in which it divides marital property. *Jolly*, 130 S.W.3d at 785; *Flannery v. Flannery*, 121 S.W.3d 647, 650 (Tenn. 2003); *Smith v. Smith*, 984 S.W.2d 606, 609 (Tenn. Ct. App. 1997). Appellate courts ordinarily defer to the trial court's decision unless it is inconsistent with the factors in Tenn. Code Ann. §36-4-121(c) or is not supported by a preponderance of the evidence. *Jolly*, 130 S.W.3d at 785-86.

The first task a court must undertake in dividing property is to classify the property as either marital or separate. Property acquired during the course of a marriage is considered marital property and is subject to division upon the divorce of the parties. Tenn. Code Ann. § 36-4-121(b)(1)(A). Real property and personal property owned by a spouse before marriage is considered separate property. Tenn. Code Ann. § 36-4-121(b)(2)(A). Property acquired in exchange for property acquired before the marriage is likewise considered separate property. Tenn. Code Ann. § 36-4-121(b)(2)(B). Separate property is not subject to division upon divorce. Tenn. Code Ann. § 36-4-121(a)(1); *Tate*, 138 S.W.3d at 876; *Smith v. Smith*, 93 S.W.3d 871, 876 (Tenn. Ct. App. 2002). Secondly, the property must be valued in order to make an equitable division.

At trial, each party submitted lists of property showing what each claimed as separate property, what was marital, and what property each party wanted. There were also lists of personal tangible property already in the possession of each party. A number of items appear on these lists without a value attached. The Statement of the Evidence includes a description of each party's testimony claiming certain property as marital or separate and valuing it. Neither party has submitted to us a table showing the property distribution with values, as required by Tenn. R. Ct. App. 7.

The trial court awarded Wife the marital home, along with its indebtedness, finding it had an equity valued at $99,246 and also determining that $25,000 of that equity was Wife's separate property. Wife was also awarded the following property: an account set up by her Mother to help Wife with expenses during the divorce, the proceeds of which had been previously withdrawn and which was apparently valued at $2700; an IRS check for $1,100; half of Husband's pension plan at EDS; and all items listed on a specific trial exhibit. That exhibit is a list of Wife's separate personal property, and no value is given for the items.

The court awarded Husband: an EDS 401K plan valued at $50,967; half of the pension plan; a Merrill Lynch account with a value of $8,633; Intergraph stock, of which the court found $5457 to be Husband's premarital separate property and $1091 to be marital property; a truck valued at $3,500; a boat valued at $6500; a four wheeler worth $1,000; various household goods listed on specific exhibits (listing separate property, items already removed from the home by Husband, and items he "needed" from the house). Very few of the items are valued. However, one exhibit identifies various hunting and fishing equipment, power tools, guns, and other items identified as "Tim's Toys" that list a value, without items separately awarded by the court, of over $20,000.

As we interpret it, the trial court awarded the most valuable marital asset, the equity in the marital home, to Wife and the second most valuable, the 401K plan, to Husband. Husband was also awarded most of the more liquid assets as well as a number of valuable pieces of personal property. As a general observation, which is all we can make based on the information before us, the division of property does not appear inequitable.

As described above, the record and briefs make it difficult to thoroughly review the property distribution to determine if, as a whole, it was equitable. Such a thorough examination is not necessary, however, because Husband has not argued that the distribution as a whole was inequitable. Instead, he challenges specific decisions by the trial court as to particular pieces of property, but does not explain how a reversal of the court on those decisions would affect the equity of the overall distribution or how he thinks the distribution should be altered.

His specific challenges include an argument that the court should have valued the EDS 401K account lower because the value dropped from the first day of trial to the second, a period of almost three months, by about $10,000. He also argues that the trial court improperly classified his premarital Intergraph stock as marital property. The basis for this argument is his assertion that the trial court used Wife's proposal for distribution of the property. To the contrary, the trial court classified most of the stock as separate property Husband owned before marriage and only a portion of its value as marital property. Even if we were to find Husband correct on the arguments, which we do not, he has not demonstrated inequity in the overall distribution.

Finally, Husband asserts that the trial court improperly classified as Wife's separate property $25,000 that should have been included in the marital estate. The Statement of the Evidence indicates that in 1985 a man named Red Summers[4] gave Wife a shoe box containing $25,000 in cash so she could attend law school. Wife entered law school, but dropped out during her first semester. There is no indication how much she spent on that first semester. Later, she used some of the money from that gift (Husband testified it was about $5,000) toward the purchase of a lot in Fayettville. Husband testified he contributed a similar amount and that the lot was titled jointly. Later, they sold the lot and applied the proceeds toward the purchase of the property upon which they built their marital home.

Wife claimed at trial that she was entitled to claim $25,000 as her separate property because of the pre-marital gift from Red Summers. The trial judge awarded Wife the marital home and made her responsible for its remaining indebtedness, but declared that $25,000 of the equity in the home should be considered her separate property because it was derived from Red Summers's gift. Husband argues on appeal that even though the $25,000 may have initially been Wife's separate property, it had become marital property by virtue of the closely-related doctrines of transmutation and commingling. This court has explained transmutation as follows:

[4]Mr. Summers was called "Uncle Red" by Ms. Hunter. He was not really her uncle, but an older friend who treated her like an uncle or a grandfather.

> Transmutation occurs when separate property is treated in such a way as to give evidence of an intention that it become marital property. One method of causing transmutation is to purchase property with separate funds but to take title in joint tenancy. This may also be done by placing separate property in the names of both spouses. The rationale underlying both these doctrines is that dealing with property in these ways creates a rebuttable presumption of a gift to the marital estate. This presumption is based also upon the provision in many marital property statutes that property acquired during the marriage is presumed marital. The presumption can be rebutted by evidence of circumstances or communications clearly indicating an intent that the property remain separate.

Eldridge v. Eldridge, 137 S.W.3d 1, 12-13 (Tenn. Ct. App. 2002), quoting *Batson*, 769 S.W.2d at 858. *See also Langschmidt v. Langschmidt,* 81 S.W.3d 741, 747 (Tenn. 2002).

Commingling is another avenue for turning separate property into marital property. It occurs ". . . when the separate property is inextricably mingled with marital property or the other spouse's separate property. Commingling does not occur if the separate property can be traced into its product or if the separate property continues to be segregated." *Eldridge*, 137 S.W.3d at 14.

Based on the Statement of the Evidence, we conclude that Wife treated $5,000 of the premarital gift in a manner that creates a presumption of transmutation. She used it to buy a piece of real property. After the lot was sold, the proceeds were used to purchase the land upon which the parties built their marital home. There is nothing in the record to indicate that the marital home was titled in any way other than in joint tenancy or in tenancy by the entireties. *See* Tenn. Code Ann. § 36-3-505. In fact, in filings and testimony before the trial court, Wife listed the home as marital property. There is also no evidence of any circumstance or communication that occurred within the course of the marriage that would rebut the presumption of a gift to the marital estate.

The record is silent as to what happened to the rest of the $25,000. Presumably, some of it was spent, as intended, on Wife's brief law school career. Neither party has alleged that any of it still exists in any form that can be traced back to the original gift from Red Summers. The record does not indicate any existing or past separate account in which those funds were deposited. More importantly, there is nothing in the testimony to indicate the money still exists. Wife was not awarded a separate tangible asset, such as a bank account. Courts can only distribute existing assets or property. Tenn. Code Ann. § 36-4-121(b)(1)(A) (defining marital property as property acquired during the marriage and owned by either spouse as of the date of the filing of the complaint).

Instead of awarding Wife a separate, existing asset, the trial court determined that $25,000 of the equity in the couple's house was her separate property. We find no evidentiary basis for this determination. The amount that went toward the marital home was converted to marital property. There is no evidence Wife treated any remaining portion as separate property or even what happened to it.

Trial courts have a great deal of discretion when they are classifying property as either marital or separate. *Eldridge*, 137 S.W.3d at 12. Consequently, appellate courts are not inclined to interfere with trial court's determination unless it is contrary to the preponderance of the evidence or it is based upon an error of law. *Id.* In the present case, the evidence preponderates against the finding that the $25,000 was Wife's separate property. We reverse the classification of $25,000 of the equity in the marital home as Wife's separate property, with the consequence that all the equity is part of the marital estate subject to distribution.

The increase in the size of the marital estate, however, does not require a reversal of the award of all the equity to Wife. Even with that change in classification, we cannot conclude that the overall distribution was inequitable just because it means Wife was awarded a larger share of that estate. Husband has not shown how the award of the home equity, or the overall distribution of property, to Wife was inequitable in light of the factors that must be considered. Thus, he has failed to show the trial court's distribution was inequitable. The parties were each allocated the property that was most necessary for their post-divorce life. Wife's acquisition of the marital home will enable her to raise the parties' children with the least amount of disruption to their lives. Husband's acquisition of the larger share of the liquid assets gives him the resources he will need to establish a new household. We do not find it necessary to modify the trial court's division of property in order to adjust the equities between the parties. Accordingly, we affirm the property division.

III. The Parenting Plan

The residential schedule approved by the court provided that Wife was to be the primary residential parent and that the children would reside with Husband every other weekend from Friday at 6:00 p.m. through Sunday morning, "when he will deliver the children to Pleasant Heights Baptist Church for Sunday School." In addition, Husband has the children every Tuesday from 3:00 p.m. to 7:00 p.m. and for two weeks during the summer. Holidays are to be alternated. The parents are to divide spring vacation. Wife is to have the children every Christmas Eve from 9:00 a.m. until 1:00 p.m. on Christmas Day. Father is to have the children from 1:00 p.m. on Christmas Day until 5:00 p.m. on December 28.

Husband objects to the permanent parenting plan entered by the court. His objections relate to the amount of residential time he was awarded and the requirement that he return the children from weekend visits on Sunday to Wife's church in time for them to attend Sunday School there.

Tennessee Code Annotated § 36-6-404 requires that a permanent parenting plan be incorporated into every divorce decree that involves minor children. A parenting plan is defined in Tenn. Code Ann. § 36-6-402(3) as "a written plan for the parenting and best interests of the child, including the allocation of parenting responsibilities and the establishment of a residential schedule, as well as an award of child support consistent with title 36, chapter 5."

A residential schedule is defined as:

> . . . the schedule of when the child is in each parent's physical care, and it shall designate the primary residential parent; in addition, the residential schedule shall designate in which parent's home each minor child shall reside on given days of the year, including provisions for holidays, birthdays of family members, vacations, and other special occasions, consistent with the criteria of this part. . . .

Tenn. Code Ann. § 36-6-402(5).

The primary residential parent is the parent with whom the child resides more than fifty percent of the time. Tenn. Code Ann. § 36-4-402(4); *Hopkins v. Hopkins*, 152 S.W.3d 447 (Tenn. 2004).

When fashioning the residential schedule, the court is instructed to take into account certain factors[5] with the goal of encouraging "each parent to maintain a loving, stable, and nurturing

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[5] Those factors are:

(1) The parent's ability to instruct, inspire, and encourage the child to prepare for a life of service, and to compete successfully in the society which the child faces as an adult;
(2) The relative strength, nature, and stability of the child's relationship with each parent, including whether a parent has taken greater responsibility for performing parenting responsibilities relating to the daily needs of the child;
(3) The willingness and ability of each of the parents to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent, consistent with the best interests of the child;
(4) Willful refusal to attend a court-ordered parent education seminar may be considered by the court as evidence of that parent's lack of good faith in these proceedings;
(5) The disposition of each parent to provide the child with food, clothing, medical care, education, and other necessary care;
(6) The degree to which a parent has been the primary caregiver, defined as the parent who has taken the greater responsibility for performing parental responsibilities;
(7) The love, affection, and emotional ties existing between each parent and the child;
(8) The emotional needs and developmental level of the child;
(9) The character and physical and emotional fitness of each parent as it relates to each parent's ability to parent or the welfare of the child;
(10) The child's interaction and interrelationships with siblings and with significant adults, as well as the child's involvement with the child's physical surroundings, school, or other significant activities;
(11) The importance of continuity in the child's life and the length of time the child has lived in a stable, satisfactory environment;
(12) Evidence of physical or emotional abuse to the child, to the other parent or to any other person;
(13) The character and behavior of any other person who resides in or frequents the home of a parent and such person's interactions with the child;
(14) The reasonable preference of the child if twelve (12) years of age or older. The court may hear the preference of a younger child upon request. The preference of older children should normally be given greater weight than those of younger children;
(15) Each parent's employment schedule, and the court may make accommodations consistent with those

(continued...)

relationship with the child." Tenn. Code Ann. § 36-6-404(b). The aim of any such decision is to place the child in an environment that will best serve his or her needs. Tenn Code Ann. § 36-6-106(a); Tenn. Code Ann. § 36-6-404; *Eldridge*, 42 S.W.3d at 85. The General Assembly has found that "[t]he best interests of the child are served by a parenting arrangement that best maintains a child's emotional growth, health and stability, and physical care." Tenn. Code Ann. § 36-6-401(a). Tenn. Code Ann. § 36-6-404 does not prescribe a particular schedule or a particular amount of time that a child ought to spend with a non-custodial parent.

Trial courts must exercise broad discretion in child custody matters. *Parker v. Parker*, 986 S.W.2d 557, 563 (Tenn. 1999). "[T]he details of custody and visitation with children are peculiarly within the broad discretion of the trial judge." *Eldridge*, 42 S.W.3d at 85, quoting *Suttles v. Suttles*, 748 S.W.2d 427, 429 (Tenn. 1988). Like a custody decision, a determination of the best residential placement plan for a child must turn on the particular facts of each case. Because of the discretion given trial courts in this area and because of the fact specific nature of such decisions, appellate courts are reluctant to second-guess a trial court's determination regarding custody and visitation or a residential schedule. *Nelson v. Nelson*, 66 S.W.3d 896, 901 (Tenn. Ct. App. 2001); *Rutherford v. Rutherford*, 971 S.W.2d 955, 956 (Tenn. Ct. App. 1997). Accordingly, appellate courts will decline to disturb a parenting plan fashioned by a trial court unless that decision is based on application of an incorrect legal standard, is against logic or reasoning, or is not supported by a preponderance of the evidence. *Eldridge*, 42 S.W.3d at 85.

Husband appears to argue, on the one hand, that the child support guidelines, a permanency plan form distributed to attorneys in the area, and prior court opinions establish a minimum of 80 days as a presumption for residential time for the parent who is not the primary residential parent.[6] We are not certain of the purpose of this argument since the schedule established by the trial court is consistent with the standard or average visitation on which the guidelines are based. Although Husband must return the children on Sunday morning instead of Sunday evening at the end of his alternate weekend residential time, he was awarded an additional 4 hours of visitation every Tuesday evening. This variation from the average schedule does not lessen the time Husband has with the children, but increases its frequency. Even if the guidelines' presumption of visitation established a presumption for a residential schedule, which it does not, the residential schedule in this case is not inconsistent with the standard or average of eighty days, contrary to Husband's assertions.

Husband also seems to assert that the residential schedule does not provide him enough residential time. He accuses Wife of proposing a parenting plan in bad faith. The plan proposed by

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[5](...continued)
schedules; and
(16) Any other factors deemed relevant by the court.

[6]For the purposes of calculating child support, Tenn. Rules & Regs. 1240-2-4-.04 of the Child Support Guidelines, describes an "average visitation period" of every other weekend from Friday evening to Sunday evening, two weeks during the summer, and two weeks during holiday periods throughout the year.

Husband did not recommend that the children alternate residences weekly during the school year because, according to his brief, of the demands school places on the children. His proposed plan differed from the schedule ordered by the court in several particulars, but the primary difference was in how the summer vacation was divided. Husband proposed the parents share that time equally in weekly periods, with him giving Wife one-week notice before each of his visitation periods. Wife proposed the children have one week with Husband. The trial court's plan gave Husband two weeks residential time.

We have reviewed the plans proposed by both parents. The trial court did not accept either in its entirety. Based on the Statement of the Evidence, we cannot conclude that the plan is inconsistent with the evidence[7] or with the applicable factors. Husband has not explained with any specificity how the schedule fashioned by the trial court is contrary to the preponderance of the evidence or appropriate legal principles.

Husband's final disagreement with the residential schedule established by the trial court is that he return the children from weekend visitation in time for them to attend Sunday School. The reason for this arrangement is explained as follows in the Statement of the Evidence:

> Ms. Hunter and both children testified to the great importance of church, in general, and Pleasant Heights Baptist Church specifically has in the children's lives. Ms. Hunter and both children likewise testified to the importance of attending Sunday School at Pleasant Heights Baptist Church. Ms. Hunter, both children and Mr. Hunter testified that Mr. Hunter had not been the religious leader of the family and that he did not attend church regularly and did not perceive church functions as an important part of his life.
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> In addition to the foregoing the Court interviewed, in chambers, the minor children of the parties. The minor children specifically testified how important attending Pleasant Heights Baptist Church was to each of them. The children had participated in Bible School activities as well as Sunday Morning Bible Studies for as long as they could remember and both children expressed a desire to continue attending all services at Pleasant Heights Baptist Church.

Husband argues that the trial court's "custom fitting" the schedule to accommodate the children's desire to attend church activities they have long participated in unjustifiably lessens his residential time. We disagree in view of the importance the children placed on continuing to attend

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[7] For example, The Statement of the Evidence includes the following: "The Plaintiff also testified about her close and loving relationship to the children, and how she helped them with their homework on a nightly basis. The Plaintiff also testified that she helped the children with their school work since they entered school, and that many times, the Defendant's work schedule would not allow him to be present in time to help the children with their homework. Even when he was home in time, she was the individual who always helped the children with their school work." This testimony, as well as Husband's recognition of the demands of school, demonstrate that residing with Wife throughout the school week is in the children's best interests.

their church every week. Continuity and stability are important to the best interests of children. Additionally, as set out earlier, the court also gave Husband visitation time one evening every week.

Husband also argues in general terms that the court's acknowledgment of the children's preference, and its ratification of that preference by incorporating it into the parenting plan, somehow constitutes a violation of the First Amendment to the United States Constitution, apparently both the establishment clause and the free exercise clause. However, Husband's objection is not really that he prefers that the children be raised in a different religion. Neither does he claim that church and Sunday School attendance are somehow detrimental to his children. He acquiesced in, or even encouraged, their attendance at and involvement in Pleasant Height Baptist Church during the parties' marriage. According to the Statement of the Evidence, Husband, Wife, and both children testified that Husband had not been the religious leader of the family, did not attend a church regularly, and did not perceive church functions as an important part of life. Thus, formal religious observance has not been of equal importance to Husband.

Tennessee Code Annotated § 36-6-404(a)(5) requires that a permanent parenting plan allocate between the parents decision making authority regarding, among other things, the children's religious upbringing. The trial court awarded joint decision making authority as to these issues. If the Husband and Wife cannot agree on this or similar subjects, they must seek resolution through mediation. We do not perceive the trial court's decision regarding the end time of Husband's visitation to constitute a choice as to the children's religious upbringing. Rather, the court sought to accommodate the children's desire to continue activities which were important to them.

We affirm the trial court's determination as to the residential schedule for the children.

IV. ATTORNEY FEES

The trial court ordered Husband to pay Wife her "reasonable attorney fees" in the amount of $8,586.80, finding that "the defendant has the ability to pay and the plaintiff has the need for payment/reimbursement. . . ." Husband asks us to reverse that award. He argues that in view of the fact that Wife received "the lion's share" in the property division, the trial court erred in holding that she needed the fee award.

An award of attorney's fees in divorce cases is considered alimony or spousal support, generally characterized as alimony *in solido*. *Yount v. Yount*, 91 S.W.3d 777, 783 (Tenn. Ct. App. 2002); *Wilder v. Wilder*, 66 S.W.3d 892, 894 (Tenn. Ct. App. 2001); *Herrera v. Herrera*, 944 S.W.2d 379, 390 (Tenn. Ct. App. 1996); *Houghland v. Houghland*, 844 S.W.2d 619, 623 (Tenn. Ct. App. 1992); *Storey v. Storey*, 835 S.W.2d 593, 597 (Tenn. Ct. App. 1992).[8]

[8]The Tennessee Supreme Court has implicitly found that attorney's fees are alimony by holding that the factors listed in Tenn. Code Ann. § 36-5-101(d)(1), *i.e.*, factors relevant to the court's consideration of an award of alimony, must also be considered in the award of attorney's fees. *Langschmidt*, 81 S.W.3d at 750-51. Further, in both *Robertson*, 76 S.W.3d at 344, and *Burlew*, 40 S.W.3d 465, 473, the Court affirmed the attorney's fee holdings of the Court of (continued...)

Because attorney's fees are considered alimony or spousal support, an award of such fees is subject to the same factors that must be considered in the award of any other type of alimony. *Yount*, 91 S.W.3d at 783; *Lindsey v. Lindsey*, 976 S.W.2d 175, 181 (Tenn. Ct. App. 1997). Therefore, the statutory factors listed in Tenn. Code Ann. § 36-5-101(d)(1) are to be considered in a determination of whether to award attorney's fees. *Langschmidt*, 81 S.W.3d at 751; *Kincaid v. Kincaid*, 912 S.W.2d 140, 144 (Tenn. Ct. App. 1995); *Houghland*, 844 S.W.2d at 623.

Initial decisions regarding the entitlement to spousal support, as well as its amount and duration, hinge on the unique facts of each case and require a careful balancing of all relevant factors. *Robertson*, 76 S.W.3d. at 338; *Watters*, 22 S.W.3d at 821; *Anderton v. Anderton*, 988 S.W.2d 675, 682-83 (Tenn. Ct. App. 1998). Among these factors, the two considered to be the most important are the disadvantaged spouse's need and the obligor spouse's ability to pay. *Robertson*, 76 S.W.3d at 342; *Manis v. Manis*, 49 S.W.3d 295, 304 (Tenn. Ct. App. 2001). Of these two factors, the disadvantaged spouse's need is the threshold consideration and the "single most important factor." *Aaron*, 909 S.W.2d at 410 (quoting *Cranford v. Cranford*, 772 S.W.2d at 50); *see also Bogan*, 60 S.W.3d at 730 (holding that in an initial award, the need of the spouse "must necessarily be the most important factor to consider, because alimony is primarily intended to provide some minimal level of financial support for a needy spouse").

Recently, the Supreme Court reaffirmed that an award of attorney's fees "is conditioned upon a lack of resources to prosecute or defend a suit in good faith . . ." and that such an award is to ensure access to the courts. *Langschmidt*, 81 S.W.3d at 751, quoting *Fox v. Fox*, 657 S.W.2d 747, 749 (Tenn. 1983). Consequently, a spouse with adequate property and income is not entitled to an award of additional alimony to compensate for attorney's fees and expenses. *Lindsey*, 976 S.W.2d at 181; *Duncan v. Duncan*, 686 S.W.2d 568, 573 (Tenn. Ct. App. 1984). If a party has adequate property and income, or is awarded adequate property in the divorce, from which to pay his or her own expenses, an award of attorney's fees may not be appropriate after consideration of all relevant factors. *Wilder*, 66 S.W.3d at 895; *Koja v. Koja*, 42 S.W.3d 94, 98 (Tenn. Ct. App. 2000); *Houghland*, 844 S.W.2d at 623-24; *Ingram v. Ingram*, 721 S.W.2d 262, 264 (Tenn. Ct. App. 1986). The award of attorney's fees as additional alimony is most appropriate where the divorce does not provide the obligee spouse with a source of funds, such as from property division, with which to pay his or her attorney's fees. *Yount*, 91 S.W.3d at 783. Additionally, if a spouse receives alimony as a result of the divorce and will be forced to deplete those funds, designed to sustain that spouse, just in order to pay attorney's fees, an award of fees is appropriate. *Batson*, 769 S.W.2d at 862.

When assessing the needs and resources of the parties, the court may consider not only the relative values of each party's property post-divorce, *see* Tenn. Code Ann. § 36-5-101(d)(1)(G) and (H), but also whether or not a party has been left with sufficient liquid assets to pay an attorney.

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[8](...continued)
Appeals without further discussion. In both those cases, the Court of Appeals specifically held that attorney's fees in divorce cases were in the nature of or treated as alimony. *Robertson v. Robertson*, No. 03A01-9711-CV-00511, 1998 WL 783339, at *8 (Tenn. Ct. App. Nov. 9, 1998); *Burlew v. Burlew*, No. 02A01-9807-CH-00186, 1999 WL 545749, at * 16 (Tenn. Ct. App. July 23, 1999).

Eldridge, 137 S.W.3d at 25; *Gilliam v. Gilliam*, 776 S.W.2d 81, 87 (Tenn. Ct. App. 1988); *Luna v. Luna,* 718 S.W.2d 673, 676 (Tenn. Ct. App. 1986).

In the present case, Wife was awarded only $5,600 in liquid assets, and almost half of that amount (the $2,700 withdrawn from the First Farmers and Merchants Bank account) had been depleted by the time of the divorce hearing. Wife was awarded the larger share of the marital assets only because she was given the equity in the marital home. She could use that asset to pay her attorney, but she would have to borrow against the equity to do so, thus incurring both transactional costs and debt. Husband is in a slightly better position to pay attorney fees, because he received over $15,000 in investments. Wife has need for the additional alimony, having few resources with which to pay the fees.

Husband himself acknowledges that the trial court has the discretion to award attorney fees where appropriate. *Langschmidt*, 81 S.W.3d at 751; *Batson*, 769 S.W.2d at 862. This Court will not interfere with such an award, "except upon a showing of abuse of discretion, where the evidence preponderates against the award, and a manifest injustice will be done if the Trial Courts's decision is allowed to stand." *Wilder*, 66 S.W.3d at 894; *Long v. Long,* 957 S.W.2d 825, 829 (Tenn. Ct. App. 1997); *Kincaid*, 912 S.W.2d at 144.

While we have sympathy with Husband's financial situation, the fact is that one of the parties must pay the fees.[9] The trial court considered Wife's need and Husband's ability to pay. We are not inclined to second-guess the trial court and find the court did not abuse its discretion in awarding Wife attorney fees. We therefore affirm the award of attorney fees.

VI.

The order of the trial court in regard to alimony, property division, parenting arrangement, and attorney fees is affirmed. Costs on appeal are taxed to Appellant, Timothy Hunter.

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PATRICIA J. COTTRELL, JUDGE

[9] Husband does not directly challenge the amount of fees, although he asserts that Wife's obstinacy on some issues caused some of the fees. However, there is nothing in the record before us to substantiate that assertion; the fee affidavit is not even included.